NO. 22075
NO. 22075A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENIS V. DEL GIUDICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GABRIEL A. GUTIERREZ,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

ARTHUR A. DICKERMAN
Attorney
Department of Health, Education, and Welfare
1521 West Pico Boulevard
Los Angeles, California 90015

Of Counsel

NO. 22075
NO. 22075A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENIS V. DEL GIUDICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GABRIEL A. GUTIERREZ,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

ARTHUR A. DICKERMAN
Attorney
Department of Health, Education,and Welfare
1521 West Pico Boulevard
Los Angeles, California 90015

Of Counsel

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

NO. 22075
NO. 22075 A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENIS V. DEL GIUDICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

Appellant filed a timely [1/] appeal from judgments of conviction for violation of the Drug Abuse Control Amendments of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 331 (q)(2) and (3) and

---

1/ A 4-count Indictment charged appellant with violation of 21 U.S.C. 331 (q)(2), 331 (q)(3), and 331 (p). [No. 22075, pp. 2-4]. On April 17, 1967, appellant pled guilty as to Count 3 of this Indictment and on the same day the District Court entered its Judgment and Probationary Order [No. 22075, pp. 6-7].

A 2-count Indictment charged appellant with additional violations of 21 U.S.C. 331 (q)(2) and (3) [22075 A, pp. 2-3]. On April 17, 1967, appellant pled guilty as to Count 1 of this Indictment and on the same day the District Court entered its Judgment and Probationary Order [No. 22075 A, pp. 4-5].

On April 24, 1967, appellant filed a Notice of Appeal from each Judgment [No. 22075, p. 8; No. 22075 A, p. 6].

21 U.S.C. 333 (a).

Pursuant to 18 U.S.C. 3231, the District Court had jurisdiction to try these cases.

Under 28 U.S.C. 1291 and 1294, this Court has jurisdiction to review the judgments of the District Court.

STATEMENT OF THE CASE

The Indictments in this appeal charged appellant Del Giudice with the sale, delivery and possession for sale of the hallucinogenic drug LSD in violation of the Federal Food, Drug, and Cosmetic Act, as amended.

On April 17, 1967, the District Court denied appellant's motions to dismiss the Indictments on grounds of alleged unconstitutionality of the statute [No. 22075, pp. 6 and 9; No. 22075 A, pp. 4 and 7]. Thereupon, appellant pled guilty to one count of each indictment, reserving the right to challenge the constitutionality of the statute on appeal [2] [No. 22075, pp. 6 and 10; No. 22075 A, pp. 4 and 8].

2/ It appears settled that guilty and nolo pleas "may be reviewed to determine whether a crime is stated by the indictment". United Brotherhood of Carpenters v. United States, 330 U.S. 395, 412, footnote 26 (1947); Jaben v. United States, 333 F.2d 535, 538 (C.A. 8, 1964), aff'd. 381 U.S. 214 (1965); United States v. Bradford, 160 F.2d 729, 730 (C.A. 2, 1947), cert. denied 331 U.S. 829; Oesting v. United States, 234 Fed. 304, 306 (C.A. 9, 1916); Universal Milk Bottle Service v. United States, 188 F.2d 959, 961-2 (C.A. 6, 1951).

On April 17, 1967, the District Court entered a judgment of conviction in each case, suspended imposition of sentence and placed appellant on probation for a period of two years, the two probationary periods to run concurrently [No. 22075, p. 7; No. 22075 A, p. 5]. On April 24, 1967, appellant filed a Notice of Appeal in each case [No. 22075, p. 8; No. 22075 A, p. 6].

RELEVANT STATUTES AND REGULATIONS

21 U.S.C. 333 Penalties - Violation of Section 331 of this title

(a) Any person who violates any of the provisions of Section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine ...

21 U.S.C. 331 Prohibited acts

The following acts and the causing thereof are hereby prohibited:

* * *

(q) ... (2) the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this title; (3) the possession of a drug in violation of Section 360a(c) of this title; . . . .

21 U.S.C. 360a Depressant and stimulant drugs ...

* * *

Sale, delivery, and disposal; persons exempt from prohibition

(b) No person . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person.

Possession restriction; burden of proof in criminal prosecutions

(c) No person . . . shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by Section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

21 U.S.C. 321 Definitions; generally

For the purposes of this chapter --

* * *

(v) The term "depressant or stimulant drug" means -

(1) any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric

acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under Section 352(d) of this title as habit forming;

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), any substance that is now included, or is hereafter included, within the classifications stated in Section 4731, and marihuana as defined in Section 4761 of Title 26.

The provisions of subsections (e), (f), and (g) of Section 371 of this title shall apply to and govern proceedings for the issuance, amendment, or repeal of regulations under subparagraph (2) (C) or (3) of this paragraph.

CONSTITUTION OF THE UNITED STATES

Article 1, Section 8

The Congress shall have power:

* * *

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

* * *

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .

REGULATIONS

21 C.F.R. 166.3 Listing of drugs defined in Section 201(v) of the Act [21 U.S.C. 321(v)]:

* * *

(c) The Commissioner has investigated and designates all drugs, unless exempted by regulations in this part, containing any amount of the following substances as having a potential for abuse because of their:

* * *

(3) Hallucinogenic effect:

Established name	Some trade and other names
DMT ----------	Dimethyltryptamine
LSD-25; LSD ---------	d-Lysergic acid diethyiamide.
Mescaline and its salts.	
Peyote ----------	
Psilocybin; psilocibin ----	
Psilocyn; Psilocin -------	

The listing of peyote in this subparagraph does not apply to non-drug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article.

ARGUMENT

A. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT HAS BEEN REVISED FREQUENTLY TO ENHANCE ITS EFFECTIVENESS AS AN INSTRUMENT OF PUBLIC PROTECTION.

The Federal Food, Drug, and Cosmetic Act was enacted in 1938 as a comprehensive statute to safeguard the public from food, drugs, devices, and cosmetics that are adulterated, misbranded, or otherwise pose a threat to the consumer. United States v. Dotterweich, 320 U.S. 277, 280 (1943); United States v. Sullivan,

332 U.S. 689, 696 (1948); United States v. Walsh, 331 U.S. 432, 437 (1947); United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 74-75 (C.A. 9, 1951); Drown v. United States, 198 F.2d 999, 1004 (C.A. 9, 1952), cert. denied 344 U.S. 920; Golden Grain Macaroni Co. v. United States, 209 F.2d 166, 168 (C.A. 9, 1953).

Since 1938, Congress has enacted a number of amendments to this law, fashioned to cope with special problems as they have arisen and become acute beyond the effective reach of the basic statute. Some examples of problems requiring amendatory legislation are excessive residues of pesticide chemicals on foods, United States v. Bodine Produce Co., Inc., 206 F. Supp. 201, 206-207 (D. Arizona, 1962), and the premature marketing of "new drugs" without adequate testing for safety and effectiveness, Turkel v. Food and Drug Administration, 334 F.2d 844, 845 (C.A. 6, 1964), cert. denied 379 U.S. 990. The amendments devised new types of controls as needed to deal with the problem at hand.

The present case arose under the Drug Abuse Control Amendments of 1965 (79 Stat. 226-236). These amendments are concerned with a limited class of drugs as defined in 21 U.S.C. 321(v), namely, drugs which (1) are dangerous and lend themselves to widespread and serious misuse throughout the nation, (2) flow freely through, pollute, and otherwise affect, the channels of interstate commerce, and (3) are distributed surreptitiously without labels or other characteristics that would identify their manufacturing source so that there is a commingling of drugs of interstate and intrastate origin, thereby frustrating the Congressional purpose to regulate interstate

traffic in such drugs.

A prior amendment enacted in 1951 (68 Stat. 648 ff) to deal with dangerous drugs had focused primarily upon unsavory dispensing practices of some pharmacists, United States v. Carlisle, 234 F.2d 196 (C.A. 5, 1956), cert. denied 352 U.S. 841, but had shown itself to be cumbersome and unwieldy in the face of widespread clandestine distribution of tremendous quantities of dangerous drugs outside the drugstore. De Freese v. United States, 270 F.2d 730, 731-2, 735-8 (C.A. 5, 1959), cert. denied 362 U.S. 944; Roseman and Copley v. United States, 364 F.2d 18, 20-24 (C.A. 9, 1966), cert. denied 386 U.S. 918.

The Roseman and Copley case, supra, decided by this Court, arose under the pre-existing statute and illustrates well some of the compelling reasons for enactment of the Drug Abuse Control Amendments. The drug in question was LSD as in the present case. It was sold in liquid form and as the Court observed at page 21:

> "When it was delivered to Pilson it did not have any label on it nor any warnings as to use, any common name, any statement of the ingredients or composition, nor any of the other markings required by the Federal Food, Drug, and Cosmetic Act. . . ."

In fact, as pointed out by the Court on page 20, there was no dispute that the defendants had sold LSD which would be in violation of the statute if it could be shown that the drug had been introduced into interstate channels.

The principal defense in Roseman was that the LSD was

made in California and had never left the state. The protracted trial revolved largely around this one issue. Defendants were convicted and the conviction sustained because evidence was adduced showing that the defendants had made their way through California to Canada and back to California with concentrated LSD in their possession, offering it for sale as they went up and down the coast, and organizing an LSD party in Canada where one participant was injured. This evidence was sufficient to meet the requirements of interstate commerce under the basic statute (page 20). After conducting the prolonged trial in Roseman and observing the great expense and difficulty entailed in establishing movement of an unlabeled dangerous drug in interstate commerce, Chief Judge Harris felt obliged to state: 3/

> " . . . I think there is a very grave responsibility upon the part of the Food and Drug authorities to make appropriate recommendations to such congressional committees as may be involved with respect to appropriate legislation in connection with this type of drug as in connection with kindred types of drugs."

Unquestionably, Judge Harris was concerned about the inadequacy of the basic statute to control effectively the growing menace of

---

3/ (C.A. 9, No. 19636, V. 9, pp. 1100-1101). We believe the Court may take judicial notice of its own records in another case. See United States v. Pink, 315 U.S. 203, 216 (1942); National Fire Insurance Co. v. Thompson, 281 U.S. 331, 336 (1930); Wiley v. United States, 144 F. 2d 707, 708 (C.A. 9, 1944).

LSD and similar dangerous drugs. On January 27, 1965, the Commissioner of Food and Drugs transmitted the views of Judge Harris to a Congressional committee that was deeply immersed in this problem (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 1st Sess. on H.R. 2), stating in part on page 23:

> "In sentencing the defendants, Judge Harris remarked that the Food and Drug authorities should recommend legislation appropriate to deal with these types of drugs to interested congressional committees."

Six months later, the Drug Abuse Control Amendments were enacted.

B. THE PATTERN AND SCOPE OF THE DRUG ABUSE CONTROL AMENDMENTS OF 1965.

For a decade and a half, 1950-1965, Congressional committees inquired into the expanding nationwide problem of drug abuse and the inadequacy of the then existing laws to control it. The Drug Abuse Control Amendments of 1965 are the end result of that study. Some of the Congressional findings are summarized in Senate Report No. 337 published in United States Code Congressional and Administrative News, 1965, pages 1895-1909. For example, at page 1896 the Report states:

> "At the hearings last year, testimony showed that over nine billion barbiturate and amphetamine tablets are produced annually in the United States.

It is estimated that over 50 percent, or 4 1/2 billion tablets, are distributed through illicit channels.

"The human toll of drug abuse cannot be measured for it affects not only the abuser but his family and the community around him. Drug abuse is closely bound up with juvenile delinquency. It also contributes to the rising crime rate in the United States. Misuse of these drugs has contributed to the rising accidents on the highways.

"The illegal traffic in drugs is enormously profitable. Barbiturates and amphetamines having a retail value of approximately $670 sell in illicit channels for in excess of $250,000."

Specifically with respect to LSD, the Report states at page 1898:

"Hallucinogens are drugs which affect the central nervous system in such a fashion as to cause the user to have a distorted sense of reality. The most prominent of the hallucinogenic drugs being abused today is d-lysergic acid diethylamide, more commonly referred to as LSD-25. This drug is sometimes used as an adjunct to psychotherapy and as a research tool in psychiatry. Its use by amateurs and drug abusers can cause some terrifying experiences for the victims. It is capable of producing prolonged psychiatric reactions in persons possessing a previous underlying personality problem, and can precipitate

the acting out of anti-social-behavior patterns."

On page 1896, the Report declares the purpose of this legislation:

> "The bill provides increased controls over the distribution of barbiturates, amphetamines, and other drugs having a similar effect on the central nervous system. The controls are accomplished through increased recordkeeping and inspection requirements, through providing for control over intrastate traffic in these drugs because of its effect on interstate traffic, and through making possession of these drugs (other than by the user) illegal outside of the legitimate channels of commerce."

The term "depressant or stimulant drug" is defined to include amphetamines and barbiturates, and, through implementing regulations, such drugs as LSD. [21 U.S.C. 321(v)(1) - (3); 21 C.F.R. 166.3(c)(3)]. The sale, delivery, and possession of these drugs (other than for personal use) is prohibited. [21 U.S.C. 360a(b) and (c); 21 U.S.C. 331(q)(2) and (3)]. Exceptions are made where the drugs are legitimate articles of commerce or research [4/] and are

---

4/ LSD is a "new drug" which may not be distributed commercially until a New Drug Application establishing its safety and effectiveness has been approved by the Food and Drug Administration. [21 U.S.C. 355(a); 21 U.S.C. 360a(b)]. There is no approved NDA for LSD. See Roseman and Copley v. United States, 364 F.2d 18, 20 and 24 (C.A. 9, 1966), cert. denied 386 U.S. 918. (Continued)

confined to the legtimate chain of distribution. [21 U.S.C. 360a(a) - (c)]. All persons (with minor exceptions) who make, sell, or otherwise dispose of any such drugs are required to maintain detailed inventories and records accounting for all quantities that pass through their hands, and failure to comply with these requirements is an offense. [21 U.S.C. 360a(d) - (f); 21 U.S.C. 331(q)(4) and 333(a)].

In addition to the data uncovered by its own inquiries, Congress relied heavily upon the authoritative Final Report dated November 1, 1963, of the President's Advisory Commission on Narcotic and Drug Abuse; the Chairman of this Commission was Judge E. Barrett Prettyman, retired Chief Judge, U. S. Court of Appeals, Washington, D.C. [Senate Report No. 337, United States Code Congressional and Administrative News, 1965, pages 1896-1897 and 1899]. On page 1 of the Introduction to the Final Report, the Commission stated in part:

> "What are these drugs that can turn potentially useful citizens into hopeless, estranged, dependent individuals? That can turn normal young men and women to crime? . . . They include cocaine, marihuana, LSD 25, mescaline, the barbiturates, the

---

4/ (Continued) A "new drug" for which there is no approved NDA may be distributed for investigational use under strict controls. [21 U.S.C. 355(i); 21 C.F.R. 130.3]. Especially tight controls have been established to govern any research in LSD, requiring advance approval of the Commissioner of Food and Drugs because of the great hazards involved. [21 C.F.R. 3.47; see also preamble to this regulation in 31 F.R. 9540].

amphetamines, ether, airplane glue and even certain of the so-called 'tranquillizers'. All profoundly affect the central nervous system and mind. The effects produced by taking these drugs are primarily on the brain and range from euphoria through excitement to depression. Some produce hallucinations. Many bring about a deep feeling that everything in life must be made to serve the purpose of maintaining a supply of the drug. These drugs are psychotoxic (mind poisoning). A psychotoxic drug is any chemical substance capable of adducing mental effects which lead to abnormal behavior. They affect or alter to a substantive extent, consciousness, the ability to think, critical judgment, motivation, psycho-motor coordination or sensory perception. Most of the psychotoxic drugs have a legitimate medical use. . . . Abuse occurs when these drugs are used for their psychotoxic effects alone and not as therapeutic media prescribed in the course of medical treatment."

In discussing The Harrison Act of 1914, the Final Report of the Commission stated on page 31:

"This method of regulation by taxation, which resulted in the vesting of narcotics control in the Department of the Treasury, can only be understood in its historical setting. When the Harrison Act was drafted, Congress was concerned

about its constitutionality. The landmark cases establishing the full sweep of federal regulatory power under the commerce clause of the Constitution were yet to come." [Emphasis added].

On pages 43-44 of the Final Report, the Commission emphasized the need for federal regulation of all non-narcotic drugs capable of producing serious psychotoxic effects:

"The manufacture, sale, and distribution of dangerous drugs is a national business, conducted across states lines, and the interstate character of the traffic, both licit and illicit, limits the ability of any single state to cope with its individual problem.

* * *

"The Commission makes several specific observations concerning any new legislation providing for federal regulation of the manufacture, sale, and distribution of dangerous drugs:

"1. Legislation should not be limited to the barbiturates and amphetamines, but should extend to all non-narcotic drugs capable of producing serious psychotoxic and antisocial effects when abused. Experience has proved that the drug abuser often turns to other drugs having similar effects when barbiturates or amphetamines become difficult to obtain." [Emphasis added].

In its Conclusion, the Commission stated on page 75:

> "The Commission is mindful that control of the drug abuse problem is a most difficult matter. The smugglers and illicit traffickers are clever and ruthless. . . . Federal action alone cannot do the job. State and local governments, private organizations, and the community at large must bring their full resources to bear on the problem. But the federal government has a crucial contribution to make." [Emphasis added].

As the result of its extensive investigations into the drug abuse problem, Congress concluded that, to regulate interstate traffic in these drugs, it was essential to control closely related intrastate activities. The reasons for this conclusion are set forth in Congressional Findings and Declaration of Policy which appear as Section 2 of the Amendments, Public Law 89-74, 79 Stat. 226. These Findings and Declaration are also quoted in 21 U.S.C.A. in the Notes following Section 360a, page 121 of the 1966 Cumulative Annual Pocket Part:

> "The Congress hereby finds and declares that there is a widespread illicit traffic in depressant and simulant drugs moving in or otherwise affecting interstate commerce; that the use of such drugs, when not under the supervision of a licensed practitioner, often endangers safety on the highways (without distinction

of interstate and intrastate traffic thereon) and otherwise has become a threat to the public health and safety, making additional regulation of such drugs necessary regardless of the intrastate or interstate origin of such drugs; that in order to make regulation and protection of interstate commerce in such drugs effective regulation of intrastate commerce is also necessary because, among other things, such drugs, when held for illicit sale, often do not bear labeling showing their place of origin and because in the form in which they are so held or in which they are consumed a determination of their place of origin is often extremely difficult or impossible; and that regulation of interstate commerce without the regulation of intrastate commerce in such drugs, as provided in this Act, would discriminate against and adversely affect interstate commerce in such drugs."

As enacted, the Drug Abuse Control Amendments do not require the Government to prove that the "depressant or stimulant drug" involved in a particular forbidden transaction [5/] had previously been transported from another State or a foreign country. This is the basis for appellant's argument that the statute as

---

5/ Such drug is subject to seizure and condemnation. [21 U. S. C. 334(a)(2)]. Persons responsible for the doing of prohibited acts with respect to such drug are subject to injunction and criminal action. [21 U. S. C. 331(q), 332(a), and 333(a)].

amended is unconstitutional.

C. THE DRUG ABUSE CONTROL AMENDMENTS ARE CLEARLY WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

Appellant attacks the constitutionality of important amendments to the Federal Food, Drug, and Cosmetic Act, without citing the long line of Supreme Court cases that have a direct bearing on this issue. These cases sustain the power of Congress to regulate local activities which substantially affect its plenary control over interstate commerce:

Heart of Atlantic Motel, Inc. v. United States,
379 U.S. 241, 251-258 (1964);

Katzenbach v. McClung,
379 U.S. 294, 299-304 (1964);

Wickard v. Filburn,
317 U.S. 111, 118-128 (1942);

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947);

United States v. Haley,
358 U.S. 644 (1958), reversing
166 F. Supp. 336;

United States v. Wrightwood Dairy Co.,
315 U.S. 110, 119-121 (1942);

United States v. Darby,

312 U.S. 100, 119-121 (1941);

United States v. New York Central Railroad Co.,

272 U.S. 457, 464 (1926);

NLRB v. Reliance Fuel Oil Corp.,

371 U.S. 224, 226 (1963).

Thus in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), the Court upheld the validity of a Federal regulation controlling the price of milk produced and sold intrastate. On page 119, the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. ... The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. ... It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a

substantial way interfere with or obstruct the exercise of the granted power." [Emphasis added].

See also Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947).

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court considered the constitutionality of the Agricultural Adjustment Act under the Commerce Clause where the statute "extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm" (page 118). In its review of the significant cases up to that time, delineating the "great latitude" of the commerce power (page 120), the Court included a quotation from an opinion of Mr. Justice Holmes (page 122):

> " ... 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' " 6/

After declaring that "the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation" (page 122), and citing a number of examples, the Court sustained the validity of the statute in these words (pages 128-9):

6/ In a later case defining the broad reach of the control of false labeling under the Federal Food, Drug, and Cosmetic Act, the Court again relied upon this concept:

> "The Act is not concerned with the purification of the stream of commerce in the abstract. The problem is a practical one of consumer protection, not dialectics."

United States v. Urbuteit, 355 U.S. 355, 357-8 (1948).

" . . . Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."

In United States v. Darby, 312 U.S. 100 (1941), the Court referred to a line of cases upholding the Congressional power where local and interstate activities are interwoven and difficult to identify and separate. On page 121, the Court said:

"A familiar . . . exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. . . . Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. Thornton v. U.S., 271 U.S. 414." [Emphasis added].

These observations are particularly appropriate with respect to drugs dealt with by the Drug Abuse Control Amendments, since they command high profits in illicit channels and move throughout the nation with great mobility but without a label stating where they were made, so that interstate and intrastate dealings in these drugs are inseparably intertwined. See also United States v. New York

Central Railroad Co., 272 U.S. 457, 464 (1926).

Nor is it relevant whether a particular local transaction is large or small. In NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963), the Court observed at page 226:

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

See also Wickard v. Filburn, 317 U.S. 111, 127-128 (1942).

Finally, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), where the Court upheld Title II of the Civil Rights Act of 1964, it stated at page 258:

> "It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, 'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . . ."

This is, of course, a landmark case in defining the breadth of the power of Congress to regulate, and protect its regulation of, interstate commerce. See pages 253-259 of the opinion.

The principles enunciated in the cases cited above have been applied to sustain the constitutionality of other provisions of the

Federal Food, Drug, and Cosmetic Act which regulate intrastate activities. Thus, it is within the constitutional power of Congress under the "Commerce Clause" to prohibit the giving of a false guaranty of assurance (to a person engaged wholly or partly in an interstate business) that a vitamin product is not adulterated or misbranded within the meaning of the Act, regardless of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. 7/ United States v. Walsh, 331 U.S. 432, 437-438 (1947).

Congress may also regulate the dispensing practices of a retail druggist in a purely intrastate transaction with respect to a drug that had previously been shipped in interstate commerce. United States v. Sullivan, 332 U.S. 689, 691-2, 696-8 (1948).

Similarly, Congress may prohibit the holding of food (after interstate shipment and before ultimate sale) under insanitary conditions whereby it may become contaminated with filth. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91-2 (1964).

Congress may further prohibit the intrastate sale and delivery of a misbranded device where the seller knows that the buyer intends to take the device to another State. Drown v. United States, 198 F.2d 999, 1004 (C.A. 9, 1952), cert. denied 344 U.S. 920.

In each of these cases, it was clear there was a rational

7/ 21 U.S.C. 331(h). Compare with erroneous statement on pages 10 and 11 of appellant's brief: "Every section in the comprehensive Federal Food and Drug Act hitherto has required that the drug sought to be controlled must have travelled in interstate commerce."

basis to conclude that regulation of the particular intrastate activity was "necessary and proper" to prevent obstruction or thwarting or nullification of the Congressional exercise of constitutional power over interstate commerce. In like manner, the Drug Abuse Control Amendments regulate "intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power". United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

Through more conventional legislation, Congress has sought to control interstate traffic (1) in "dangerous drugs" that are suitable for bona fide prescription sale [21 U.S.C. 353(b)(1)], and (2) in unproven "new drugs" which include certain of the dangerous drugs such as LSD that are not yet suitable for prescription sale [21 U.S.C. 355 and 321(p)]. Such legislation is ineffective to deal with the vast quantities of "depressant and stimulant" drugs [21 U.S.C. 321(v)] that move through the channels of interstate commerce in a clandestine manner, because they carry no indicia of interstate origin so that it is "often extremely difficult or impossible" to establish the element of interstate commerce or of smuggling. [Congressional Findings and Declaration of Policy, quoted supra in Part B of this argument; see also Roseman and Copley v. United States, 364 F.2d 18, 21 (C.A. 9, 1966), cert. denied 386 U.S. 918]. Congress has found in addition that misuse of these drugs often endangers safety on the highways, without distinction as to interstate and intrastate traffic thereon.

As a last resort, and to prevent frustration of its constitutional power, Congress enacted the Drug Abuse Control

Amendments as the only effective way to regulate interstate commerce in drugs of this type which are characterized by an indistinguishable blending of interstate and intrastate activities. Clearly, this is a valid exercise of Congressional power, wholly consonant with the great judicial rulings in constitutional law, and the "necessary and proper" grant in Article 1, Section 8, of the Constitution. See Katzenbach v. McClung, 379 U.S. 294, 301-2 (1964).

The record keeping requirement throughout the chain of distribution of "depressant or stimulant" drugs was also an important factor in the legislative decision to regulate both intrastate and interstate activities in these drugs. [21 U.S.C. 360a(d) - (f) and 331(q)(4)]. Record keeping was deemed essential because vast quantities of these drugs were being diverted to illicit and non-medical usage. Such diversions would be difficult to conceal under the record audits prescribed by the statute. Yet the required record keeping imposes a task which many would shun if they could. How better could one avoid this record keeping for illicit purposes and defeat the statutory objective than by asserting that the drugs came from a local source? In addition, legitimate interstate commerce in "depressant or stimulant" drugs would be adversely affected by the failure to regulate intrastate commerce in such drugs since legitimate wholesalers and distributors would have a bookkeeping incentive to purchase drugs of local origin if such are available, and discriminate against drugs of interstate origin.

With respect to "new drugs" such as LSD whose safety and

effectiveness have not yet been established [21 U. S. C. 321(p)(1)], it is the policy of Congress to encourage their nationwide distribution for legitimate investigational use under appropriate safeguards so as to make valuable drugs available to the public as soon as their usefulness and safety are proven. [21 U. S. C. 355(i); 21 C. F. R. 130. 3; Turkel v. Food and Drug Administration, 334 F. 2d 844, 845 (C. A. 6, 1964), cert. denied 379 U. S. 990]. Black market distribution of a drug like LSD for kicks instead of controlled research, with bizarre and tragic results as well as unfavorable notoriety, interferes with the orderly investigation, development, and marketing of a drug which has a potential for good as well as harm. There is a disinclination on the part of the bona fide researcher to become involved with a drug which has a sordid reputation. There is a similar reluctance by the manufacturer to make an investment in a stigmatized drug for bona fide research. The Swiss firm that developed LSD and sponsored its investigational use in this country since 1953, discontinued its sponsorship in 1966; the only legitimate supplier of LSD for research in the United States is a Government agency, the National Institute of Mental Health. [Testimony of the Commissioner of Food and Drugs in Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 2d Sess., June 7, 1966, pages 2133-2136].

Thus the clandestine traffic in LSD, whether local or interstate, adversely affects a vitally important type of interstate commerce in the drug -- namely, interstate distribution for genuine

investigational use. Regulation of intrastate commerce as well as interstate commerce in such drugs is essential to prevent or minimize these adverse effects.

Much of appellant's brief consists of a discussion of cases dealing with narcotics. But those cases are not relevant here since Congress chose a different regulatory pattern in enacting the Drug Abuse Control Amendments. The narcotic laws create rebuttable presumptions regarding interstate commerce. The Amendments in question rest upon a different basis since they dispense with any showing of interstate commerce in an individual case involving a "depressant or stimulant" drug.

Appellant's brief suggests that these Amendments are an initial step toward Federal preemption (page 15). This is entirely incorrect. Section 10 of the Amendments unequivocally declares a Congressional intent to the contrary:

> "(b) No provision of this Act nor any amendment made by it shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision or amendment operates to the exclusion of any State law on the same subject matter, unless there is a direct and positive conflict between such provision or amendment and such State law so that the two cannot be reconciled or consistently stand together.
>
> "(c) No amendment made by this Act shall be construed to prevent the enforcement in the Courts

of any State of any statute of such State prescribing any criminal penalty for any act made criminal by any such amendment."

[Quoted in 21 U. S. C. A. in the Notes following Section 321, page 73, of the 1966 Cumulative Annual Pocket Part].

Congress in fact contemplated that the States would have an increasing role in the control of this problem. See Senate Report 337, U. S. Code Congressional and Administrative News, 1965, page 1904.

Appellant's brief (page 6) erroneously suggests that any high school chemistry student and any "half-baked" chemist can make LSD, and that this is conceded by Government officials. This very point was raised in a Congressional hearing on June 7, 1966. We quote from the pertinent colloquy involving Congresswoman Dwyer, Dr. Goddard (Commissioner of Food and Drugs), and Dr. Banes (Deputy Director, Bureau of Scientific Research):

"MRS. DWYER. Mr. Chairman, may I ask Dr. Goddard a question. Should the components of LSD be regulated by law?

"DR. GODDARD. Of course, Mrs. Dwyer, as you will recall, we have proposed for control, lysergic acid, which is one of the immediate precursors because we felt that in some instances, this was being obtained and being used to synthesize LSD-25, and so that step has been taken. So as we identify these precursors, we can attempt to bring

them under control, too.

"MRS. DWYER. Is it true that LSD can be made very simply, if you get the components, by a high school student or college student or are many of these reports in the press exaggerated?

"DR. GODDARD. Our chemists have made this in our own laboratories and I have with us Dr. Banes who may wish to comment on that, but it is my understanding that a reasonably competent chemistry major in college could take one of the precursors and in 4 to 5 hours, produce a quantity of LSD sufficient for a number of trips. Of course it would depend on the quantities he started with. Dr. Banes.

DR. BANES. I can expound on that but slightly. I think Dr. Goddard has given the essential facts. The conversion of lysergic acid to LSD can be performed by a competent chemist, providing he has the facilities and the materials. It is not a bathtub procedure. You and I couldn't perform it without the proper facilities, and high school students probably would not have the proficiency nor access to the materials to perform it. But college students, especially in advanced departments in universities, undoubtedly could perform the process and come up with a potent product." [Emphasis added].

[Hearings before a Subcommittee of the Committee on Government

Operations, House of Representatives, 89th Cong., 2d Sess., pages 2180 and 2124.]

We believe it appropriate to call to the Court's attention the case of Deyo v. United States (C. A. 9, No. 22058). The Deyo case presents essentially the same question as the instant case with respect to the constitutionality of the Drug Abuse Control Amendments. Argument in the Deyo appeal is now set for January 17, 1968, and we will at that time advise the Court of the pendency of this case.

CONCLUSION

We submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GABRIEL A. GUTIERREZ,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

ARTHUR A. DICKERMAN
Attorney
Department of Health, Education and Welfare

Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ